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No. 98-740

IN THE
Supreme Court of The United States
OCTOBER TERM, 1998

NEC CORPORATION and
HNSX SUPERCOMPUTERS, INC.,
Petitioners,

v.

UNITED STATES AND DEPARTMENT OF COMMERCE,
Respondents

and

CRAY RESEARCH, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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I. NEC'S CLAIM IS NOT "MOOT"

The Federal Respondent ("DOC") argues that this Court should deny NEC's petition as "moot," because the proceeding that NEC claims was prejudged has been completed. DOC does not, however, contend that NEC's claim is moot in the constitutional sense.[1/]

Rather, DOC acknowledges that the CIT had jurisdiction of NEC's claim at the outset, but argues that completion of the antidumping proceeding divested the CIT of its statutory jurisdiction. DOC Br. Opp. at 14-15. According to DOC, the statute at issue, 28 U.S.C. § 1581(i), confers jurisdiction on the CIT only if all alternative remedies are "manifestly inadequate"; hence the CIT *loses* its jurisdiction once a claim becomes "reviewable under another provision [of § 1581]." DOC Br. Opp. at 15. When Commerce issued its final determination, the argument runs, that determination was reviewable under 28 U.S.C. § 1581(c). At that point, NEC was required to abandon this lawsuit, and to relitigate its prejudgment claim as part of a direct administrative appeal from the final antidumping determination under § 1581(c).

DOC's theory has two fundamental defects. First, the existence of subject matter jurisdiction "depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). *See also Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426,

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[1] On that issue, the Federal Circuit correctly held: "[E]ven if an intervening event satisfies some of the plaintiff's concerns, the case is not moot if other consequences of defendants' actions remain." Pet. App. 15a (citations omitted). The Federal Circuit's decision was correct. *See Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (an appeal is moot in the constitutional sense only if events during the pendency of the appeal make it "impossible for the court to grant 'any effectual relief whatever'"); *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979) (a case is not moot unless "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation").

428 (1991) (per curiam) ("We have consistently held that if jurisdiction exists at the time the action is commenced, such jurisdiction may not be divested by subsequent events"). Second, DOC's theory would penalize a party that properly invoked the CIT's jurisdiction under § 1581(i), by requiring it to begin again and relitigate from scratch a matter already decided by the same tribunal. Under no stretch of the imagination could such a remedy be deemed "adequate"—either from the plaintiff's perspective or that of the CIT.

DOC's mootness argument also reflects a serious misunderstanding of the adequacy of the remedy theoretically available to NEC in a direct appeal under § 1581(c). Under that section, the CIT has jurisdiction over "any civil action commenced under section 516A of the Tariff Act of 1930," which includes direct appeals from final determinations by Commerce under the antidumping laws. Section 516A (19 U.S.C. § 1516a) limits the scope of the CIT's authority in a direct antidumping appeal. For example, in a direct appeal the record before the CIT consists only of evidence presented in the course of the antidumping investigation, not evidence pertaining to Commerce's conduct prior to the initiation of the investigation. *See* 19 U.S.C. § 1516a(b)(2) (defining record on review of Commerce determination). Because the statutes and regulations governing antidumping investigations do not provide respondents with any right to discovery,[2] the administrative record would not contain any evidence pertaining to NEC's prejudgement claim — including the testimonial or documentary evidence regarding Commerce's external dissemination of the Predecisional Memorandum, its White House contacts, or the defense of its actions before Congress.

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[2] *See* 19 U.S.C. § 1673 *et. seq.*; 19 C.F.R. part 353.

In addition, a direct appeal may be brought only by a "party to the [antidumping] proceeding" at issue. 19 U.S.C. § 1516a(a)(2)(A). Because NEC elected to challenge the Department's prejudgment *ab initio*, rather than participate in a constitutionally flawed antidumping proceeding — a right which both the Federal Circuit and the CIT affirmed[3] — NEC would have been foreclosed from initiating a direct appeal of DOC's final determination under § 1581 (c).

Finally, DOC asserts that § 1581(i) does not authorize the CIT to craft "a post-determination remedy that addresses the effect of Commerce's final order, such as an injunction against its enforcement." DOC Br. Opp. 16. To the contrary, on remand, the CIT will have ample authority to fashion meaningful relief, including a declaratory judgment that Commerce's antidumping investigation was tainted by prejudgment, and an injunction barring enforcement of the antidumping order.[4] The Department's contention that NEC must forego that relief, and instead start afresh in a new proceeding, has no basis in either law or logic.

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[3] Pet. App. 13a-15a, 40a-41a, n.11.

[4] *See* 28 U.S.C. § 1585 (The CIT "shall possess all the powers in law and equity of, or conferred by statute upon, a district court of the United States").

II. RESPONDENTS' ARGUMENT THAT THE FEDERAL CIRCUIT DID NOT APPLY AN "IRREVOCABLY CLOSED MIND" TEST IS ERRONEOUS

DOC contends that NEC's "claim of conflict [among the circuits] lacks merit," because the Federal Circuit "nowhere held that the test for impermissible bias is an 'irrevocably closed mind.'" DOC Br. Opp. 19-20; *see also* Cray Br. Opp. 21. Respondents argue that the Federal Circuit properly applied the standard articulated by this Court in *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482 (1976), i.e., that a party can prevail on its claim of prejudgment only by establishing that "the decision maker is 'not capable of judging a particular controversy fairly on the basis of its own circumstances.'"[5] *Id.* The Court of Appeals, Respondents insist, mentioned the "closed mind" standard only "as an 'example' of the sort of showing that would satisfy the [*Hortonville*] standard." DOC Br. Opp. 20 (citing Pet. App. 24a).

Respondents are wrong. Although the Federal Circuit did initially refer to the "irrevocably closed mind" test as an example of how the *Hortonville* standard *might* be met,[6] the court went on to hold that the former test is the standard that *must* be met to disqualify an administrative decision maker on grounds of prejudgment:

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[5] As noted in petitioners' initial brief, *Hortonville* involved the alleged prejudgment of legislative, rather than adjudicative facts. Pet. at 20.

[6] Pet. App. 24a ("Th[e] [*Hortonville*] standard is met when the challenger demonstrates, for example, that the decision maker's mind is 'irrevocably closed' on a disputed issue.").

> [W]e are reluctant to circumvent the normal administrative procedure absent a showing that the decision maker's mind is 'irrevocably closed.'

Id. at 24a. The court then reviewed the facts on which NEC's prejudgment claim was based, and specifically held that they

> do not either separately or cumulatively establish that Mr. LaRussa's mind was 'irrevocably closed.'

Id. at 29a.

The Federal Circuit's adoption of the "closed mind" test was clear and unequivocal, as was the court's rejection of the standard that has been embraced by the other circuits:

> As an abstract proposition, NEC's proposed standard is a goal to which all government decision makers might aspire. However, as a practical matter, we are not persuaded that NEC's standard is the correct one . . . .

Pet. App. 21a.[7] Moreover, since "proof of closed minds is normally impossible," *see, e.g.*, KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 9.8, at 84 (3d ed. 1994), the District of Columbia, Sixth,

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[7] Although the Federal Circuit inexplicably failed to acknowledge that the test proposed by NEC was the *Cinderella II* "disinterested observer" standard, its description of the standard it was rejecting leaves no doubt on that point: "NEC offers the following articulation of the prejudgment standard . . . 'the test to be applied is whether objective facts reveal that the decision maker has 'in some measure' prejudged the issues presented in a subsequent administrative hearing.'" Pet. App. 21a.

Eighth, and Tenth Circuits could not have found unconstitutional prejudgment, as they did, had they applied the standard used by the Federal Circuit.[8]

III. THE CONDUCT CHALLENGED BY NEC WAS IRREGULAR AND FELL OUTSIDE THE SCOPE OF COMMERCE'S STATUTORY DUTIES

The Respondents assert that this case can be distinguished from *Cinderella II*, *Staton*, and *Antoniu*, because, in this case, the actions on which NEC's prejudgment claim is based were neither "irregular" nor "extra-statutory," but rather taken pursuant to Commerce's statutory authority to self-initiate an antidumping proceeding. DOC Br. Opp. 27-28 ("[N]o irregular or extra-statutory conduct took place"); *see also* Cray Br. Opp. 18-19 ("[T]he actions of the Department of Commerce of which NEC complains were within the scope of its duties and responsibilities for administering the antidumping laws"). That argument simply cannot be squared with the findings of the courts below.

The Federal Circuit qualified its holding that Commerce had not unconstitutionally prejudged the outcome of the supercomputer antidumping investigation with an express statement that Commerce's actions were tantamount to "a high-level political buzz-saw," and were sufficiently irregular that they were not to be emulated:

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[8] Indeed, the fact that the Federal Circuit purported to *follow Hortonville*, while the other circuits have distinguished it in similar cases, is further evidence of the split among the circuits. *Staton v. Mayes*, 552 F.2d 908, 914 (10th Cir.), *cert. denied*, 434 U.S. 907 (1997) (applying the *Cinderella II* test that was rejected by the Federal Circuit here).

> Our conclusion that NEC has failed to establish an invalidating prejudgment on the part of the government officials involved *is not a statement that the conduct of these officials is to be emulated.* But for the fortuitous intervention at the final stages of the process of a different decision maker the outcome could well have been different. Thus *NEC is not without grounds for feeling aggrieved.* Presumably it entered into the competition for the UCAR contract on the supposition that the vendor with the best product for the lowest cost would win. Then *it ran into a high-level political buzz-saw apparently motivated by a desire to protect a domestic industry*

Pet. App. 30a-31a (emphasis added). Similarly, the CIT found as a matter of fact that "the disclosure of the Predecisional Memorandum to NSF, NEC, UCAR and NCAR was for purposes of the procurement [and not the administration of the antidumping laws]," *Id.* at 51a; the CIT also expressed serious concern that during a high level interagency meeting that it considered to be "the critical event in NEC's prejudgment claim," a top Commerce official made a statement that "a dumping finding and an injury determination by the ITC could be made and successfully upheld." *Id.* at 72a-73a ("the wisdom of making such a statement can certainly be questioned . . . [t]he risk is that the statement becomes a self-fulfilling prophecy").

The Federal Circuit's extended caveat and the CIT's finding of fact cannot reasonably be reconciled with DOC's argument that "Commerce acted well within its statutory and

regulatory role in enforcing the antidumping laws." *See* DOC Br. Opp. 27.

IV. THE STATEMENTS AND ACTIONS OF BOTH ROBERT LARUSSA AND HIS SUPERIORS ARE RELEVANT TO WHETHER COMMERCE PREJUDGED THE SUPERCOMPUTER INVESTIGATION

Notwithstanding DOC's claim to the contrary,[9] the statements and actions relevant to NEC's prejudgment claim include not only those of Robert LaRussa, the nominal decision maker in the supercomputer antidumping investigation, but also those of Mr. LaRussa's superiors.

The decisions of other circuits clearly acknowledge that a decision maker's independence may be compromised by mandates or positions publicly espoused by colleagues, superiors, or institutions. For example, in *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), the court recognized that one member of a Commission cannot be treated in isolation from the rest of a decisionmaking body:

> Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured.

Id. at 592 (citation omitted). Applying that principle, the court found that participation by the FTC Chairman in a proceeding which he had prejudged may have influenced the ultimate outcome of the proceeding, notwithstanding the fact

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[9] DOC Br. Opp. 25; Cray Br. Opp. 23.

that his individual vote was not necessary for a majority. It therefore vacated the FTC's order and remanded the case for de novo consideration without the participation of the Chairman.[10/] The court in *American Cyanamid v. FTC*, 363 F.2d 757, 767-768 (6th Cir. 1966), similarly recognized the "influence of one [decision maker] upon the others" in remanding a case for de novo consideration without the participation of the tainted decision maker.

By the same token, the influence of the statements and actions of his Commerce Department superiors on Mr. LaRussa cannot be ignored. In addition to Mr. LaRussa's immediate predecessor as Assistant Secretary for Import Administration, the Secretary of Commerce, the Under Secretary for International Trade, and the Department's General Counsel -- all of whom were Mr. LaRussa's superiors -- were participants in the actions on which NEC based its claim. Pet. 3-6 (citing Pet. App. 4a, 6a, 30a-31a, 49a, 51-53a, 72a-73a). As the CIT found, although Mr. LaRussa was the nominal decision maker in the supercomputer antidumping investigation, he was subject to the direct supervision of the Secretary of Commerce and the Under Secretary for International Trade. Pet. App. 41a.

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[10] To support its argument that the only statements and actions relevant to NEC's prejudgment claim were those of Robert LaRussa, DOC cites *Cinderella* for the propositions that, "Bias in a decision maker cannot be established merely by alleging bias or prejudgment by other agency officials or staff" and that a "distinction must be drawn" between the individual decision maker and the agency staff or the agency as a whole. DOC Br. Opp. 25-26 (citing *Cinderella*, 425 F.2d at 586). In fact, however, the cited passage stands for the contrary finding that "the entire Federal Trade Commission including the Commissioners, hearing examiners, staff, etc., ... [and] not ... the five 'Commissioners' sitting as a reviewing body" is the relevant decision maker with respect to factual questions in certain proceedings. *Cinderella* at 586.

Moreover, the argument that Mr. LaRussa was somehow shielded from the influence of his superiors at Commerce who had earlier announced, authorized, disseminated, or defended the conclusion that NEC was guilty of dumping vector supercomputers is belied by the fact that Mr. LaRussa was briefed on Commerce's position and participated in meetings on Capitol Hill at which Commerce's conclusions were discussed in detail.[11] Pet. App. 51a-53a. Only by improperly applying the "irrevocably closed mind" test was the Federal Circuit able to discount the clear evidence of "unfairness and the appearance of unfairness," *American Cyanamid v. FTC*, 363 F.2d at 767, attending the DOC proceeding that would have been readily evident to any disinterested observer.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[11] The Federal Circuit failed to acknowledge that Mr. LaRussa participated in a June 10, 1996 meeting with members of the House Ways and Means Committee and Senate Finance Committee to explain DOC's position regarding NEC's proposed sale of supercomputers to UCAR. *See* Pet. App. 51a-53a.